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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, ET AL., PETITIONERS

v.

ANNA BARRERA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A38) is reported at 475 F. 2d 1338. The opinion of the district court (Pet. App. A39–A44) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A48–A49) was entered on March 16, 1973. The petition for a writ of certiorari was filed on July 5, 1973, and was granted on October 15, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 241e, provides in part:

> (a) A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria, as the Commissioner may establish)—
>
> (1) that payments under this subchapter will be used for programs and projects (including the acquisition of equipment, payments to teachers of amounts in excess of regular salary schedules as bonus for service in schools eligible for assistance under this section, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects and facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs, * * * and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly

operated programs and projects under this subchapter * * *;

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; * * *.

Title 45, Section 116.19 of the Code of Federal Regulations provides in part:

(a) Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation. The special educational services shall be provided through such arrangements as dual enrollment, educational radio and television, and mobile educational services and equipment. * * *

(b) The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a basis comparable to that

used in providing for the participation in the program by educationally deprived children enrolled in public schools.

(c) The opportunities for participation by educationally deprived children in private schools in the program of a local educational agency under Title I of the Act shall be provided through projects of the local educational agency which furnish special educational services that meet the special educational needs of such educationally deprived children rather than the needs of the student body at large or of children in a specified grade. * * *

(d) Any project to be carried out in public facilities and involving a joint participation of children enrolled in private schools and children enrolled in public schools shall include such provisions as are necessary to avoid classes which are separated by school enrollment or religious affiliation of the children.

(e) Public school personnel may be made available on other than public school facilities only to the extent necessary to provide special services (such as therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services) for those educationally deprived children for whose needs such special services were designed and only when such services are not normally provided by the private school. The application for a project including such special services shall provide assurance that the applicant will maintain administrative direction and control over those services. * * * Provisions for special educational services for educationally deprived children enrolled in private schools shall not include the

paying of salaries for teachers or other employees of private schools, except for services performed outside their regular hours of duty and under public supervision and control, nor shall they include the using of equipment other than mobile or portable equipment on private school premises or the constructing of private school facilities.

Commissioner of Education, Title I Program Guide No. 44, 4.5 (1968) provides in part:

> The needs of private school children in the eligible areas may not be identical with those of public school children and, hence, may require different services and activities. Those services and activities, however, must be comparable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority. "Comparability" of services should be attained in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children.

QUESTIONS PRESENTED

1. Whether Title I of the Elementary and Secondary Education Act, 20 U.S.C. 241a, *et seq.*, requires that public school teachers provide special educational services, such as remedial reading, on the premises of religiously-affiliated private schools.

2. Whether Title I, to the extent it permits such services, violates the Establishment Clause of the First Amendment.

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INTEREST OF THE UNITED STATES

This case presents important questions respecting the meaning and constitutionality of Title I of the Elementary and Secondary Education Act. In implementation of the policy of the United States to improve the quality of education in this country, Title I provides financial assistance to local educational agencies serving areas with high concentrations of educationally deprived children from low-income families. Since the adverse educational effects of poverty are not limited to children in public schools, but also afflict children in private schools, Title I provides that the assistance thereunder should benefit both categories of children. We are informed by the Commissioner of Education that his most recent compilation of state reports (for fiscal year 1971) shows that approximately 6,000,000 public school children and 350,000 private school children received services under Title I.

The United States Commissioner of Education is responsible for the overall administration of Title I. He has promulgated regulations governing the operation of that title, including the participation in its remedial programs of children enrolled in private as well as public schools. The United States is vitally concerned that, in deciding this case, the Court interpret and apply Title I and the Commissioner's implementing regulations in a way that properly effectuates the important public interests the statute and the regulations are designed to accomplish. The United States also has a strong interest in defending the constitutionality of Title I.

STATEMENT

This case raises statutory and constitutional questions regarding the obligation of the State of Missouri under Title I of the Elementary and Secondary Education Act, 20 U.S.C. 241a, *et seq.* ("Title I"), to provide special educational services to educationally-deprived children attending religiously-affiliated private schools. The respondents (plaintiffs in the district court) are the parents of children attending such schools in Missouri. The petitioners (defendants in the district court) are the Missouri Commissioner of Education and members of the State Board of Education.

1. *The Statute and the Regulations of the United States Commissioner of Education.*– Title I provides funds to local educational agencies to meet the needs of educationally-deprived children in school attendance areas having high concentrations of children from low-income families (20 U.S.C. 241e(a)(1)). An "educationally deprived child" is defined by the regulations of the United States Commissioner of Education as one who needs special educational assistance to raise his level of educational attainment to that appropriate for a child of his age (45 C.F.R. 116.1 (i)).

The United States Commissioner of Education allocates the funds to the States. State educational agencies, in turn, distribute the funds to local educational agencies under a statutory formula based on the number of children from low-income families in each school district (20 U.S.C. 241c(a)(2)). In order to

obtain funds, a local educational agency must submit a written application to the State educational agency proposing a project to meet the special educational needs of educationally-deprived children. State agencies are authorized to approve any program, consistent with criteria prescribed by the Commissioner, which gives "reasonable promise" of meeting the needs of such children (20 U.S.C. 241e(a)(1)).

The Congressional declaration of policy in Title I (20 U.S.C. 241a) states that "[i]n recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs," it is "the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children."

Title I authorizes financial assistance only for special programs, such as remedial reading and mathematics classes, which are designed to meet the needs of educationally-deprived children. To insure that other expenditures are not reduced upon the receipt of federal funds, the Act states that the funds will be used "to supplement and, to the extent practical, increase the level of funds that would * * * be made

available from non-Federal sources * * *" (20 U.S.C. 241e(a)(3)(B)(i)), and "in no case [will Federal funds be used] * * * to supplant such funds from non-Federal sources" (20 U.S.C. 241e(a)(3)(B)(ii)).

The statute requires that a local agency must provide services under Title I programs to disadvantaged children enrolled in both public and private schools.[1] The Act provides that a public agency must retain "control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency * * * and that a public agency will administer such funds and property." 20 U.S.C. 241e(a)(3)(A). Local agencies furnishing such services to private school children are subject to the guidelines established by the Commissioner of Education, which provide, *inter alia:*

> The services provided with Title I funds must always remain under the administrative direction and control of a public agency. These services may not be administered by the private school.

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[1] The statute permits the State educational agency to make a grant to a local educational agency only upon its determination that, among other things, "to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate * * * [20 U.S.C. 241e(a)(2)]."

> No Title I funds may be used for religious worship or instruction.[2]

In accordance with the Commissioner's regulations (45 C.F.R. 116.19(e)), all Title I programs are operated by public education agencies, and all persons performing services under those programs do so as employees of the public agencies.

Title I is sufficiently flexible to allow local agencies to observe, where possible, state and local restrictions upon aid to private school children (*e.g.*, prohibition against dual enrollment).[3] Accordingly, Title I programs may be provided in a different manner to private and to public school children. For example, remedial services for private school students might be provided outside their regular classroom, while being provided in the regular classroom for public school students. In addition, the content of the services could differ if the "special educational needs" required to be met under 20 U.S.C. 241e(a)(1)(A) of the two groups differ. The Commissioner of Education, however, has sought to assure that the different forms in which the services may be furnished to the two categories of children provide equally a reasonable promise of meeting the needs of the children, by requiring that the services supplied to private school children "must be comparable in quality, scope and opportunity for participa-

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[2] HEW, Office of Education, Title I ESEA Participation of Private School Children, A Handbook for State and Local Officials, pp. 12–14. These requirements are based on 45 C.F.R. 116.19(e) and 20 U.S.C. 885.

[3] The Handbook, *supra*, pp. 19–20, sets forth in detail the scope of a local agency's authority to take these restrictions into account when developing Title I services for private school children.

tion to those provided for public school children with needs of equally high priority" (Commissioner of Education, Title I Program Guide No. 44, 4.5 (1968)).

2. *The Proceedings Below.*—This litigation was commenced by the parents of children attending religiously-affiliated schools in Missouri. They alleged that Title I services were being arbitrarily denied to Missouri private school children, because those services furnished to their children allegedly were inadequate. They sought an injunction requiring the local educational agencies to provide their children with teaching services comparable to those furnished to public school children with Title I funds, and allowing public school teachers to provide special services in private schools during regular school hours (App. 20–21).

The district court held that Title I did not require that private school children receive equivalent educational programs, but only that they receive services representing an "equitable mathematical share of Title I funds" (Pet. App. A43). Finding that plaintiffs could be furnished their proper dollar amount of services in after-hours and summer school programs (Pet. App. A41, A43), the court denied plaintiffs' requested injunction (Pet. App. A44).

The court of appeals, with one judge dissenting, reversed. The court held that the Commissioner's guidelines requiring "comparability" between services to private and public school children contemplated that the programs must be comparably designed to meet the needs of the two groups of children, and not merely equivalent in dollar amount expended (Pet. App. A12–A16). Concluding that the services previ-

ously furnished the plaintiffs' children were not equivalent, the court remanded the case to the district court to establish guidelines for a Title I program for private school children "comparable in size, scope and opportunity to that provided eligible public school children" (Pet. App. A29–A30).

The court also rejected the defendants' contention that the Missouri law allegedly prohibiting the provision of services by public teachers on private school premises could override the requirements of Title I. The court held that:

> * * * state and local educational agencies cannot lawfully provide services for eligible public school children and at the same time deny comparable programs to eligible private school children by simply commingling such [Title I] funds with proscribed state "public funds." * * * Thus, we find that when the need of educationally disadvantaged children requires it, Title I authorizes special teaching services * * * to be furnished by the public agency on private as well as public school premises [Pet. App. A24–A25].

The court declined to decide the constitutionality of permitting public school teachers to provide Title I services on private school premises. It pointed out that "no particular program * * * is mandatory under the Act. * * * A local educational agency may request Title I funds for a variety of uses, and none of these specific remedial programs are now before us" (Pet. App. A26–A27). It concluded (*id.* at A26) that "it would be improper for us to pass on the

constitutionality of an abstract program of remedial teaching services which are not properly before us."

On the remand, the district court entered a decree directing the defendants to comply with the requirements of Title I as announced by the court of appeals (Pet. App. A45–A47). Among other things, the judgment requires that all Title I applications "shall provide services and activities which meet the special need of such pupil and which are comparable and equitable in quality, scope and opportunity for participation to those provided to eligible public school pupils similarly situated" (*id.* at A46). The court also ordered (*id.* at A45–A46) that "when the needs of eligible children require it, special personnel services may be furnished under Title I by the public agency on private as well as public school premises, and further if such special personnel services are furnished public school children during regular school hours and on the public school premises where the pupil regularly attends, then comparable and equitable personnel services must be provided eligible private school children during regular school hours on the private school premises where the private school child regularly attends."

Petitioners appealed from that judgment of the district court (Pet. App. A51–A52) but, after this Court granted the petition for a writ of certiorari, filed a suggestion of mootness with the court of appeals, which then dismissed the appeal (Pet. Br. 9).

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ARGUMENT

INTRODUCTION AND SUMMARY

The petition for certiorari in this case presented two questions: (1) whether Title I "require[s] that, notwithstanding contrary State law, particular educational services funded pursuant to the Act be performed in religious schools * * *" and (2) if the Act so requires, whether it violates the Establishment Clause of the First Amendment (Pet. 2).

We submit, however, that the court of appeals did not hold that Title I *requires* that such services be provided in private schools, but only that it *permits* them to be so furnished. The precise holding of the court of appeals on this point was as follows

> * * * Title I *authorizes* special teaching services, as contemplated within the Act and regulations, to be furnished by the public agency on private as well as public school premises [Pet. App. A25, emphasis added].

Earlier in the opinion, the court had stated that the district court had "agreed with the defendants' contention that the Act does not permit the assignment of public school teachers to non-public schools" (*id.* at A16–A17), and that it viewed as error "the district court's interpretation of Title I as involving a broad proscription of public teacher services in the private schools * * *" (*id.* at A18).[4]

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[4] Although the dissenting judge interpreted the majority opinion as holding that "Title I *mandates* the assignment of public school teachers to private schools" (Pet. App. A38, emphasis in original), neither the language of the majority opinion nor its legal analysis indicates that the court so construed the statute.

The statutory issue in this case, therefore, is not whether Title I compels local educational authorities to provide remedial educational services on the premises of religiously-affiliated schools, but whether it authorizes them to do so. We submit that the language and the legislative history of the statute require an affirmative answer to that narrower question. They both show that the local school authorities are given broad discretion to determine how to provide Title I services, subject only to the guidelines of the Commissioner of Education designed to insure that services provided to public school children are comparable to those furnished to private school children.

The court of appeals remanded the case to the district court to establish guidelines that would provide private school children with an adequate Title I program. In the circumstances, the court of appeals correctly declined to decide the constitutionality of the use of public teachers to provide remedial educational services on the premises of religiously-affiliated schools. The precise form in which those services will be provided under the guidelines of the district court has not yet been determined, and it is not known whether the program will involve the presence of public teachers on private school premises. The court of appeals thus correctly refused to decide "important constitutional questions on an abstract or hypothetical basis" and to "pass on the constitutionality of an abstract program of remedial teaching services which are not properly before us" (Pet. App. A26).

Under the settled practice of this Court in constitutional adjudication, we submit that it, too, should not decide the consitutional issue which petitioners raise in the abstract and hypothetical context in which it is presented. Before deciding that issue, it should await the formulation of the specific detailed plan for providing those services which will be established and which will place the constitutional issue in a concrete context. Indeed, the issue petitioners raise before this Court may never have to be decided, since the program may not involve the use of public school teachers in providing the remedial services on private school premises. Moreover, if the plan adopted does provide for public school teachers to enter the private school premises, the precise manner in which the services are there provided may itself be a significant factor in determining the constitutionality of the program.

Finally, we shall show that, if the Court deems the constitutional issue ripe for review, the use of public school teachers to furnish the special remedial educational services on private school premises would not violate the Establishment Clause of the First Amendment. The Title I programs are similar to those types of aid to religiously-affiliated schools that this Court has upheld under the Establishment Clause. The programs are not designed to aid religiously-affiliated schools, but to aid all educationally deprived children no matter which schools they attend. The Title I programs do not involve the kind of excessive government entanglement in religion which led to the invalidation of the State plans providing direct

aid to religiously-affiliated schools and their teachers in *Lemon* v. *Kurtzman*, 403 U.S. 602, and do not create the serious potential for political divisiveness that also concerned the Court in those cases.

I. TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 AUTHORIZES BUT DOES NOT REQUIRE PUBLIC SCHOOL TEACHERS TO FURNISH REMEDIAL EDUCATIONAL SERVICES ON PRIVATE SCHOOL PREMISES

Both the language and the legislative history of Title I show that, although Congress intended that all educationally deprived children, whether enrolled in public or private schools, were to receive the remedial educational programs for which the statute provides, it also gave the local educational agencies great latitude in devising programs to accomplish that objective. Title I provides for grants to local educational agencies "upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)" that several standards have been met (20 U.S.C. 241e(a)). These include that the programs will be "designed to meet the special educational needs of educationally deprived children * * *" (20 U.S.C. 241e(a)(1)(A)), and will be "of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs * * *" (20 U.S.C. 241e(a)(1)(B)). Title I also requires that "to the extent consistent with the number of educationally deprived children in the school district * * * who are enrolled in private * * *

schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate" (20 U.S.C. 241e (a)(2)).

The Senate Committee report on Title I stated:

> * * * consistent with the number of educationally deprived children in the school district who are enrolled in nonpublic * * * schools, the local educational agency will make provision, under the terms of the act, for including special educational services and arrangements. * * *
>
> It should be emphasized, however, that no suggested program is in itself mandatory upon a public school authority. The selection of an appropriate program or programs, for which State educational authority approval is sought, rests with the local educational agency.
>
> Thus, the act does anticipate broadened instructional offerings under publicly sponsored auspices which will be available to * * * students who are not enrolled in public schools [S. Rep. No. 146, 89th Cong., 1st Sess. 11–12].

Similarly, the House Committee report on the 1966 amendments to Title I, which were made the year after the statute was enacted, pointed out:

> From the earliest consideration of the Elementary and Secondary Education Act it was the intention of the committee that educationally deprived children be reached by the public school system regardless of the school a child regularly attended. Thus, it was provided that public programs would be offered to educa-

> tionally deprived children enrolled in non-public schools without requiring those children to be in fulltime attendance in the public school. Extremely broad authority was therefore given local school districts in the types of projects and programs that they could devise, including health and welfare projects only indirectly related to elementary education, in order to assure that such programs and projects could operate as a part of the public school system in conformance with local and State legal and constitutional requirements [H. Rep. No. 1814, 89th Cong., 2d Sess. 3–4].

The Senate Committee report on the Act made it clear that, where necessary to accomplish the objectives of Title I, public school teachers could provide special remedial educational services on private school premises. It stated:

> It is anticipated, however, that public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school [S. Rep. No. 146, 89th Cong., 1st Sess. 12].

See also the remarks of Rep. Carey and Rep. Perkins, managers of the House Bill, 111 Cong. Rec. 5747–5748.

The regulations of the United States Commissioner of Education, which mainly track and amplify the

statutory standards, and the guidelines of the Office of Education confirm that the local educational agencies have broad discretion to select the particular method of providing Title I services that they consider most appropriate. For example, the regulations provide that applications by local educational agencies "must propose projects of sufficient size, scope and quality as to give reasonable promise of substantial progress toward meeting the needs of educationally deprived children for whom the projects are intended" (45 C.F.R. 116.18(a)). The Commissioner's Title I Program Guide No. 44, 4.5 (1968) states: "The needs of private school children in the eligible areas * * * may require different services and activities." Similarly, the Office of Education's handbook provides:

> Basically the law requires that the local educational agency (LEA) must provide special educational services for educationally deprived children enrolled in private schools * * * Nowhere is a particular method prescribed or mandated [Title I ESEA Participation of Private School Children, A Handbook For State and Local Officials, p. 1].[5]

The court of appeals thus correctly stated (Pet. App. A26) that "no particular program, curriculum or service is mandatory under the Act." In recognition of the special problems involved in providing remedial services to educationally deprived children

[5] See also letter of July 3, 1967, by the Assistant Commissioner of Education, stating: "* * * Title I does not require that private school children be served through any particular type of arrangement" (Def. Ex. 7, Vol. VII, Appendix in Court of Appeals).

who may have a variety of different problems that require correction, Congress and the Commissioner of Education wisely left it to the informed judgment and discretion of the local education agencies to determine how such services can best be provided to the children requiring them.[6] This discretion is subject to the Commissioner's supervisory authority to insure that the local programs meet the "basic criteria" that he has "establish[ed]" (20 U.S.C. 241e(a)) to insure compliance with the Congressional purpose of "meeting the special educational needs of educationally deprived children" (20 U.S.C. 241a). This flexibility enables the local educational agencies to develop adequate programs for children attending religiously-affiliated schools which take account of any special provisions of state law governing such schools, such as prohibitions upon dual enrollment of children in both private and public schools.

In order to insure that any differences between the programs provided for public and private school children do not result in supplying the latter with inferior services, the Commissioner has required that

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[6] In exercising this discretion some local educational agencies in Missouri have indicated their desire to provide Title I services during regular school hours on private school premises, but they were prevented from doing so by a State Department of Education regulation prohibiting public school teachers from going onto the premises of a private school during such time. This regulation is based on the Education Department's determination (contrary to an opinion of the Missouri Attorney General, No. 26, 1970) that Title I funds are subject to proscriptions in the state constitution against the use of public funds to provide services to private school students (Pet. App. A19–A20).

Title I programs for private school children must be

> * * * comparable in quality, scope and opportunity for participation to those provided for public school children with needs of equally high priority [Commissioner of Education, Title I Program Guide No. 44, 4.5 (1968)].

Here, as in the Act and other regulations and guidelines, the Commissioner has merely directed that the Title I services provided to private school children must be "comparable" to those provided to public school children. He has not attempted to direct the local educational authorities how to insure that comparability or what form it should take. He has not even suggested, let alone provided, that such comparability should be achieved by having public school teachers provide Title I services on private school premises. He has left it to the local educational agencies to make that decision.

Similarly, the court of appeals has not directed, although it has permitted, such use of public school teachers in providing comparable Title I services to private school children. The court did hold that the district court had erred in concluding that the Commissioner's "comparability" standard was satisfied by providing the private school children with a proportionate dollar amount of Title I services since this remedy failed to consider whether the services furnished private school children, such as after-school or summer classes, offered a promise of success equal to those afforded public school children. Concluding that the methods previously used by the local agency (after-school classes and summer programs) did not

provide such a comparable program, the court remanded the case to the district court for the development of guidelines which would assure Missouri private school children "participation in a meaningful program * * * comparable in size, scope and opportunity to that provided eligible public school children" (Pet. App. A29–A30).[7]

The court of appeals' statement (Pet. App. A25) that "when the need of educationally disadvantaged children requires it, Title I authorizes special teaching services * * * to be furnished by the public agency on private as well as public school premises" does not indicate that the State was required so to use public school teachers. To be sure, the court of appeals recognized (Pet. App. A23–A24) that if Missouri law precludes the furnishing of "comparable programs" for private school children, the consequence would be that the State either would have to change its law "or deprive all its educationally disadvantaged children of the economic benefits of the Act." In that situation, however, the choice would be for the State to make, and the State would be required to choose not because federal law requires that public school teachers supply the services on private school premises but because the State itself provides that the services cannot be furnished in the private schools.

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[7] In view of the uncontroverted testimony of educational experts that such after-school programs for private school children are not comparable in effectiveness or promise of success to those provided during the regular school day for public school children, the court of appeals correctly held that such services do not meet the requirements of the Act and regulations (Pet. App. A11–A16).

Title I and the Commissioner's regulations require only that there be no discrimination between private and public school children in the furnishing of remedial educational services; they leave it to the local agencies to determine how they will provide comparable services to both categories of children.

II. THIS COURT SHOULD NOT DECIDE WHETHER THE PROVISION OF TITLE I SERVICES ON PRIVATE SCHOOL PREMISES IS CONSTITUTIONAL, SINCE THE QUESTION IS PRESENTED IN A HYPOTHETICAL AND ABSTRACT CONTEXT WHICH IS NOT A PROPER FRAMEWORK FOR RESOLVING THE ISSUE.

Although petitioners argue at length (Br. 26–42) that "Assignment of publically employed personnel to teach in religious schools during regular school hours violates the Establishment Clause of the First Amendment," that question is not actually involved in this case at this time. There is no more occasion for this Court to decide it than there was for the court of appeals to do so.

As we have pointed out (*supra*, pp. 14, 22–23), the court of appeals did not direct that public school teachers provide Title I services on private school premises, but merely authorized them to do so. It remanded the case to the district court to develop guidelines for Title I programs that will assure Missouri private school children "participation in a meaningful program * * * comparable in size, scope and opportunity to that provided eligible public school children" (Pet. App. A29–A30). The precise form that such program ultimately will take, however,

has not yet been determined. There is no way of knowing whether the program ultimately adopted will provide Title I services on private school premises or, if it does, under what circumstances and conditions it will be done. Indeed, the State could adopt a program for furnishing Title I services to public and private school students on a comparable basis that would not involve the presence of any public school teachers on private school premises.

The order the district court entered on the remand (Pet. App. A45–A46) provided that "special personnel services may be furnished under Title I by the public agency on private as well as public school premises," and that if such services are furnished public school children "during regular school hours and on the public school premises where the pupil regularly attends, then comparable and equitable personnel services must be provided eligible private school children during regular school hours on the private school premises where the private school child regularly attends."

The first portion of that provision, however, only authorizes but does not require that Title I services be furnished on private school premises. The second portion requires the provision of those services on private school premises only if the State also provides them to public school children "during regular school hours and on the public school premises where the pupil regularly attends." If the State decides to provide the services in the public schools either after regular school hours or in a different school from

that which the children regularly attend, it is not required to provide any services on private school premises but only to provide private school children with services that are "comparable and equitable in quality, scope and opportunity for participation to those provided to eligible public school pupils similarly situated" (Pet. App. A46). The method by which, the form in which and the place where such comparable services are to be provided, however, is under the order left to the discretion of the State educational authorities.

Moreover, even if the services were provided on private school premises, the manner in which that is done may be significant in determining their constitutionality. For example, the result might be different if services were provided for two hours a week on private school premises by a regular public school teacher than if provided by a private school teacher hired by the school authorities for that purpose.

It is a well-settled principle of constitutional adjudication that this Court will not " 'anticipate a question of constitutional law in advance of the necessity of deciding it.' " *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (Brandeis, J., concurring). This principle has frequently been applied when the constitutional question is presented without an adequate factual basis, or where the question itself may change because of future actions of lower courts and administrative bodies. *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568–569, 575; *Parker* v. *Los An-*

geles County, 338 U.S. 327; *Burton* v. *United States*, 196 U.S. 283, 295. Conversely, this Court has been aided in the adjudication of difficult constitutional issues when they were presented for decision on the basis of a full factual record describing in detail the operation of challenged programs. See *Tilton* v. *Richardson*, 403 U.S. 672, 680–682; *Lemon* v. *Kurtzman*, 403 U.S. 602, 615–622.

This Court should not decide the important constitutional questions which the provision of remedial educational services on private school premises raises without knowing all the detailed facts concerning the actual program under which those services are to be supplied. It should not decide the issue on the basis of what the court of appeals, in refusing to decide the constitutional question, properly characterized as "an abstract program of remedial teaching services which are not properly before us" (Pet. App. A26).

III. THE USE OF PUBLIC SCHOOL TEACHERS TO PROVIDE REMEDIAL EDUCATIONAL SERVICES TO EDUCATIONALLY DEPRIVED CHILDREN ON PRIVATE SCHOOL PREMISES WOULD NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

If, contrary to our submission in Point II, the Court should conclude that the constitutional issue is ripe for decision, then we submit that the use of public teachers to provide Title I services on the premises of religiously-affiliated schools would not violate the Establishment Clause of the First Amendment.

A. TITLE I IS A RELIGIOUSLY NEUTRAL STATUTE THAT PROVIDES EDUCATIONAL BENEFITS COMPARABLE IN FORM AND SCOPE TO THOSE THAT THIS COURT HAS UPHELD UNDER THE ESTABLISHMENT CLAUSE

The present statute, unlike the legislation aiding religiously-affiliated schools which this Court has recently invalidated (see *Lemon* v. *Kurtzman, supra; Levitt* v. *Committee for Public Education & Religious Liberty,* No. 72–269, *Committee for Public Education & Religious Liberty* v. *Nyquist,* No. 72–694, and *Sloan* v. *Lemon,* Nos. 72–459 and 72–620, all decided June 25, 1973), was not designed primarily to provide financial assistance to private schools. Its purpose was to enable local educational authorities to meet "the special educational needs of educationally deprived children" (20 U.S.C. 241a), no matter what schools they attend. As noted (*supra,* p. 6), fewer than 6 percent of the children in this country who received Title I aid in fiscal year 1971 were enrolled in private schools. The figures for Missouri are comparable. In Kansas City, where the respondents live, about 7,000 public school children were enrolled in Title I programs; it was estimated that there were 355 educationally deprived private school children residing in the eligible attendance area (Pet. App. A8), who presumably also would receive the services.

In contrast, the two State aid programs struck down in the *Lemon* case were specifically designed to alleviate the financial situation of the States' non-public schools and provided benefits only to those schools. *Lemon, supra,* 403 U.S. at 606–607, 609; *Sloan, supra,* slip op. 1–2. Similarly, the New York programs

which this Court invalidated last Term in *Levitt* and *Nyquist* involved various forms of financial aid given solely to non-public schools.

The form and scope of the educational benefits provided under Title I are comparable to those which this Court has upheld against challenges under the Establishment Clause in such cases as *Everson* v. *Board of Education*, 330 U.S. 1, where the State reimbursed parents for bus fares paid for transporting students to public and private schools; *Board of Education* v. *Allen*, 392 U.S. 236, involving a State plan under which public school authorities lent text books without charge to all students of the State, including those attending private schools, and in which the Court cited with approval its prior statement in *Everson* (330 U.S. at 16–17) that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation" (392 U.S. at 242); and *Tilton* v. *Richardson*, 403 U.S. 672, where the Court upheld the constitutionality of the Federal Higher Education Facilities Act of 1963, under which federal grants were made to colleges and universities, including religiously-affiliated ones, for the construction of facilities to be used for secular educational purposes.

Like the programs upheld in those cases, the Title I program is religiously neutral. It provides remedial educational services for all educationally deprived children, no matter which schools they attend. It is not designed to aid private schools. Indeed, since the remedial educational services to be provided under

Title I are required to be supplementary to those "made available from non-Federal sources" (20 U.S.C. 241e(a)(3)(B)(i))—*i.e.*, they must be in addition to those the schools normally provide—Title I may fairly be viewed as not providing any aid to the religiously-affiliated schools in their normal operations. To whatever extent Title I does provide government aid to religiously-affiliated schools, therefore, the aid is at most indirect and peripheral. It is a far cry from the types of government assistance to religiously-affiliated schools that this Court has previously invalidated under the Establishment Clause.

B. TITLE I MEETS THE CRITERIA THIS COURT HAS APPLIED FOR DETERMINING WHETHER A STATUTE SATISFIES THE ESTABLISHMENT CLAUSE.

In *Committee for Public Education* v. *Nyquist*, *supra*, the Court summarized the "well defined three-point test that has emerged from our decisions" (slip. op. 14) that, "to pass muster under the Establishment Clause," a statute

> first, must reflect a clearly legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion [slip op. 15, citations omitted].

Title I satisfies all three of these criteria.

1. *Title I Has a Clearly Secular Purpose.*—As petitioners themselves recognize (Br. 29), Title I has a secular purpose. As previously explained (*supra*, pp. 7–9, 17–19), the aim of Congress was to provide important remedial educational services to all educationally deprived children without regard to whether they

attend public or private schools. The objective was not to aid religiously-affiliated schools but to help educationally deprived children regardless of the schools they attend.

2. *Title I neither Advances nor Inhibits Religion.*—As explained above (pp. 7–9, 17–19), Title I is religiously neutral. It provides remedial educational services to all children, including those attending private schools. No governmental funds are given to the private schools or used to pay teachers for conducting regular instruction in those schools. The educational services provided supplement the regular curriculum, and are performed exclusively by employees of the public educational agencies.

There is nothing in the Title I programs that furthers or aids the private schools in conducting the religious aspects of their educational programs, or inhibits them from doing so. Although the provision of Title I remedial services on the premises of religiously-affiliated schools could make those schools more attractive to the parents of children attending them, that collateral benefit is "not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment" (*Board of Education* v. *Allen, supra,* 392 U.S. at 242; see, also, *Everson* v. *Board of Education, supra,* 330 U.S. at 17–18).

Petitioners contend (Br. 30–34), however, that Title I and the Commissioner's regulations constitute a prohibited support of religion because they contain no effective safeguards to insure that the public school

teachers will not utilize the remedial educational instruction as a vehicle for inculcating religious beliefs. This possibility is so unlikely and remote that it affords no basis for concluding that the Title I program constitutes government support of religion.

As we have explained (*supra*, pp. 7–8, 9–10), the Title I programs are formulated, administered and operated by the public educational agencies. The teachers providing the services, no matter where they do so, are employed by and under the complete control of the public agencies.[8] Accordingly, there is not here present the "potential for conflict" that concerned this Court in *Levitt* v. *Committee for Public Education & Religious Liberty* (No. 72–269, decided June 25, 1973, slip op., 8), which struck down a New York statute providing grants to religious schools to prepare State-required examinations. There the Court noted (*ibid.*) "the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." See *Lemon* v. *Kurtzman, supra*, 403 U.S. at 617, where this Court spoke of "the danger that a teacher under religious control and

[8] Petitioners contend (Br. 11, 27), on the basis of one law review article and two studies dealing with Title I in New Jersey and New York, that Title I teachers are actually recruited and controlled by the religious institutions. No evidence regarding those programs, or recruiting of teachers for Missouri programs, was presented to the district court. Accordingly, consideration of this contention would be inappropriate at this time.

discipline poses to the separation of the religious from the purely secular aspects of pre-college education."

In the present case, in contrast, the religiously-affiliated schools would have no control over either the content of the special remedial instruction or the way in which the instruction were given. Those determinations would be made by the public educational authorities solely on the basis of the secular standards provided in Title I and the Commissioner's regulations and guidelines. The public school teachers providing the services would not be subject to the authority and discipline of the people running the religiously-affiliated schools, but only to the control of the public agencies which hire, pay and direct them. As Mr. Justice Brennan pointed out, in explaining his vote to deny certiorari in *Nebraska State Board of Education* v. *School District of Hartington*, 409 U.S. 921, where the lower court had upheld the provision of Title I remedial reading and remedial mathematics services to both public and private school students upon premises the school district had leased from a Catholic school:

> [T]he school district would have no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses would operate completely independently of that curriculum and of the Catholic school administration [*id.* at 926].

3. *Title I Involves No Excessive Government Entanglement with Religion.*—The basic character of the Title

I programs—under which employees of local educational authorities working under the control and supervision of those authorities provide supplementary remedial educational services to educationally deprived children pursuant to plans formulated and administered by the public authorities—insures that the programs will not involve excessive government entanglement with religion.

The contrary argument of petitioners (Br. 34–42) and *amicus curiae* Missouri Coalition for Public Education and Religious Liberty (Br. 28–36) relies mainly upon *Lemon* v. *Kurtzman, supra*. There this Court invalidated two State plans for providing financial aid to private schools, because they involved excessive government entanglement with religion. The aspects of those plans which constituted such entanglement, however, are not present in the Title I programs.

The two State plans struck down in those cases involved direct State grants (1) to private schools for the costs of teaching secular subjects and (2) to teachers of secular subjects in those schools. The administration and control of the teaching and the content of the secular courses were under the direct supervision and control of the religiously-affiliated schools. In those circumstances, as the Court noted, the State inevitably would be required to conduct "comprehensive, discriminating, and continuing surveillance" of the schools to assure that the secular purposes of the financial aid were observed (403 U.S. at 619).

In contrast, there would be no occasion for such public surveillance of private schools in connection with the operation of Title I programs. Those programs require no distinction to be made between secular and sectarian subjects, and are conducted by employees of public educational agencies under the complete control of those agencies.*

There is similarly no likelihood that providing Title I services on private school premises would create the serious potential for political divisiveness that also concerned the Court in *Lemon* (403 U.S. at 622–624). The State plans there involved annual legislative appropriations "that benefit relatively few religious groups" and that were thus likely to intensify "[p]olitical fragmentation and divisiveness on religious lines" (*id.* at 623). The Court distinguished (*ibid.*) *Walz* v. *Tax Commission*, 397 U.S. 664, which upheld State tax exemptions for real property owned by religious organizations and used for religious worship, on the ground that that decision "dealt with a status under state tax laws for the benefit of all religious groups," where the likelihood of such "[p]olitical fragmentation and divisiveness" was much less.

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*Of course, there will be circumstances in which the public educational authorities will review the performance of Title I teachers who provide services on private school premises. But the purpose would not be, as petitioners suggest (Pet. Br. 36–37), to determine whether the teachers are fostering religion, but whether they are teaching effectively. This review would be required whether particular teachers teach in public or private schools, or in both.

In the present case, unlike the State plans involved in *Lemon*, the statute is not designed to benefit religiously-affiliated schools at all, and whatever benefit it may give them is collateral and incidental. Only about 5 percent of the chidren who would receive benefits under Title I attend private schools. "[I]n terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor" (*Nyquist, supra,* slip op. 36). In the present case, as in *Allen* and *Everson*, "the class of beneficiaries included *all* school children, those in public as well as those in private schools" (*id.* at 24, n. 38, emphasis in original). Here as in those cases, there is not sufficient potential for creating divisiveness to constitute a prohibited governmental entanglement with religion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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